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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-653

THE STATE OF WASHINGTON,

Petitioner

vs.

MICHAEL J. FOX and
GUADALUPE M. GAMBOA.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner prays that a Writ of Certiorari issue to review the judgement of the Supreme Court of the State of Washington entered in the above entitled case on May 24, 1973, and which became final on July 17, 1973.

OPINION BELOW

The Opinion of the Washington State Supreme Court, reproduced in Appendix A hereto, is reported in 82 WD 2d 289 (1973).

JURISDICTION

The Opinion of the Court below was filed May 24, 1973, Appendix A (infra). In Washington, no separate judgment

is entered. A timely petition for rehearing was filed with the Washington State Supreme Court, and the Petition for a Rehearing was denied July 17, 1973. (Appendix B). Jurisdiction of this Court is invoked under 28 U.S.C.. S1257(3).

QUESTION PRESENTED

Do the rights and protections accorded to a private property owner under the common law, the Fifth and Fourteenth Amendments to the United States Constitution and state trespass statutes, yield to the First Amendment rights of would-be visitors seeking entrance upon his property for the purpose of locating property owner's employees, where the owner, in his operation of a farming enterprise, houses some 200 male migrant employees in open bay barracks on the same property that he houses his farm equipment, shops and office, notwithstanding the fact that the would-be visitors are unknown to the property owner, refuse to name tenants they desire to visit and otherwise refuse to abide by reasonable rules and regulations set down by property owner as a condition precedent to entrance upon his property?

In the event this petition is granted, the petitioner reserves the right to argue two further questions; i.e.. whether an attorney at law has a First Amendment right to go upon private property, uninvited, to seek out prospective clients residing thereon and, therefore, exempt from prosecuting for criminal trespass; and whether a farm labor organizer has a First Amendment right to go upon private property to seek out laborers who live and work thereon, to join his union, without first seeking permission from the owner-employer, or without otherwise showing that he could not reach said laborers at any other location.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment I

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment V

"No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV, Sec. 1

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

Statutes

Washington Revised Statute 9.83.080. Criminal Trespass

"(2) Every person, knowing that he is not licensed or privileged to do so, who enters or remains in any public or private place or on any public or private premises as to which notice against trespass thereon is given by the owner or someother authorized person, through (a) actual communica-

tion to the actor, or (b) posting in a manner prescribed by law or reasonably likely to come to the attention of intruders or (c) fencing or other enclosure manifestly designed to exclude intruders, shall be guilty of criminal trespass, a misdemeanor.

"(3) Every person, knowing that he is not licensed or privileged to remain, who defies an order to leave public or private places or public or private premises communicated to him by the owner of said place or premises or by some other authorized person, shall be guilty of criminal trespass, a misdemeanor.

"It is a defense to prosecution for criminal trespass under this section that (a) . . . , or (b) any place or premises referred to in this section were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises or (c) . . .".

STATEMENT OF THE CASE

Since the court below totally disregarded the facts of this case as well as the trial court's uncontroverted Findings of Fact (which under Washington law are to be accepted as the established facts of the case. *Seattle v. Muldrew*, 420 P.2d 702, 69 Wn.2d 877 [1966]), petitioner deems it necessary to make a more thorough statement of the facts than generally recommended in this type of petition.

Rogers of Walla Walla, a food processing company, hereinafter referred to as "company", leases certain property for the purpose of operating an asparagus farm, and within the boundaries of this property is located housing for its employees, hereinafter referred to as "camp". The camp is used for several purposes, one of which is to house some

220 migrant male workers in approximately seven open bay barracks, for a period of approximately six weeks during the harvesting of the asparagus. The camp is also used the entire year to house all of the company's farm machinery, shop and office, as well as a two-story house wherein a tenant, other than a migrant worker, resides. (Uncontroverted Finding of Fact No. 4). A company man is always on duty at said camp and a part-time guard is employed during the weekends and on payday nights to keep order at the camp, assist the migrant workers with any of their problems, and assist visitors in locating said workers. (St. 31, ln. 20-29). The camp was used solely for private purposes and not generally open to the public. (St. 19, ln. 11-16). A "No Trespass" sign was posted at the entrance of the camp and all visitors entering the camp would be met by the guard, asked their business, and, if they desired to see a tenant, the name of the tenant, unless the man in charge was informed earlier that the visitors had permission to enter the camp. (St. 7, ln. 24-26; St. 20, ln. 9-12). If visitors desired to see a tenant, the guard would then locate the tenant, at which time the tenant and visitor would be left alone. (St. 8, ln. 19-21).

During the night in question, respondents Fox and Gamboa drove onto the campgrounds, past the "No Trespass" sign, on a Saturday evening, June 19, 1971, a payday for the migrant workers. (St. 25, ln. 28; St. 30, ln. 28; and St. 206, ln. 19-22). The respondents, casually dressed, were accompanied by two young women and another male companion. (St. 27, ln. 1-6). From the testimony of the respondents, they clearly intended not to cooperate with the guard on duty, refused to tell them their specific purpose for being there, and refused to name any of the tenants they desired to visit. (St. 207, ln. 4-12; St. 210, ln. 22-30; St. 220, ln. 20-25; St. 246, ln. 30; St. 247, ln. 27; and Uncontroverted Findings of Fact Nos. 17 and 18)

The guard on duty had no prior knowledge of the re-

spondents or their companions, had not seen them prior to the date in question, and could only rely upon respondents' own assertations as to their identity and intentions, and was highly suspicious that they might be thieves or there soliciting prostitution, or etc. (St. 37, ln. 13-17; St. 54, ln. 12-20). Furthermore, no employee-tenant living at the camp had expressed a desire to see the respondents, nor did any employee-tenant come forth on the night in question or ever testify during the trial of the respondents that they were ever invited to said camp. (St. 28, ln. 9-14).

Since respondents refused to tell the guard the names of the tenant or tenants they desired to see, and since respondents started through the camp, the guard ordered them to leave the premises. Respondents refused to seek permission from the company to remain at the camp, refused to name any tenants they desired to see and refused to leave stating that they had a First Amendment right under a New Jersey decision by the name of *Shack*, and did not need to seek permission from the owner-employer or name any tenants they desired to see. (St. 27, ln. 20-24; St. 36, ln. 13-26; St. 229, ln. 20-25; St. 230, ln. 12-17; St. 246, ln. 30-St. 247, ln. 7).

The Walla Walla County Deputy Sheriff was called for assistance and after the Deputy Sheriff arrived at said camp and located respondents he inquired of respondents their purpose for being at the camp and was met with the same answer that was given to the guard. The Deputy Sheriff then informed them they were trespassing, and unless they complied by the rules of the company, would have to leave. Respondents refused to comply with said rules and, therefore, were given five minutes to leave or be subject to arrest for trespassing. The companions of respondents left the premises, but respondents chose to be arrested, which seemed to be their goal from the very beginning. (St. 64, ln. 19-26; St. 228, ln. 19-20; St. 252, ln. 19-26; St. 259, ln. 12-16; Uncontroverted Findings of Fact Nos. 17, 18 and 24).

Furthermore, contrary to the Federal District Case, *Franceschina v. Morgan*, 346 Fed. Supp. 833 (1972), which the court below relied upon in reversing the trial court's judgment against said respondents, the evidence here is clear that the company rules requiring visitors to seek permission from the company or name the tenant-employee they desire to visit were administered in a nondiscriminatory manner. In fact, no visitor had ever been refused permission to see a tenant-employee so long as he abided by this rule, and no tenant-employee was ever denied the right to visit with whomever he so desired, including an attorney or a union organizer. (St. 33, ln. 19; St. 34, ln. 27; St. 23, ln. 14-27; St. 58, ln. 9-12; and St. 59, ln. 9-26; St. 208, ln. 21-24; St. 211, ln. 3-4; St. 258, ln. 8-12; St. 261, ln. 10-21). Furthermore, the evidence as well as the trial court's uncontroverted Findings of Fact Nos. 26 and 32 clearly showed that the company had never interfered with any union organizer or attorney attempting to visit with employee-tenant, and had the respondents sought permission from the company to talk with all of the employee-tenants at said camp, said permission would have been granted and place made available at a time convenient to all concerned. (St. 58, ln. 13-15; St. 124, ln. 18-25).

Upon refusal of respondents to leave said camp, they were arrested and charged with the crime of Criminal Trespass in violation of RCW 9.83.080. The cases against both respondents were consolidated and tried together July 9, 1971, before The Honorable Howard J. Martin, Justice of the Peace. Both respondents were found guilty of the crime and fined $25.00 each. Respondents appealed to the Superior Court for Walla Walla County and said cases were tried before The Honorable Albert N. Bradford, Judge, on December 9 and 10, 1971. Trial court found respondents both guilty of the crime of Trespass, and entered its Findings of Fact and Conclusions of Law. Respondents, within the statutory period of time, filed their notice of appeal to the Washington State Supreme Court. On October 10, 1972, the Washington State

Supreme Court heard oral arguments before a "standing room only" crowd consisting of United Farm Workers. Seven months later, on May 4, 1973, the Washington State Supreme Court rendered its decision reversing the trial court's judgment and dismissing the causes of action against both respondents. Petitioner, within the statutory period of time, petitioned the Washington State Supreme Court for review, which petition was denied July 17, 1973, at which time the lower court's judgment became final.

REASON FOR GRANTING THE WRIT

I. This petition raises substantial significant questions concerning the respective rights and duties of private property owners who house their employees upon their property.

This question that is squarely presented by the facts of this case, which the lower court did not even consider, substantially effect the Fifth and Fourteenth Amendment rights of the landowner-employer, who houses his employees-tenants on his property; and in particular his right to form rules and regulations concerning the behavior of his employee-tenants and would-be visitors who seek entrance upon said property. The proper resolution of this question not only has great significance to the landowner, but also to the petitioner who, as in this case, was summoned to assist the owner-employer to evict unknown and unwanted visitors who alleged that if they were arrested they would file tort actions against the petitioner since they have a constitutional right under the First Amendment to be there. The determination of this question also has special significance to the farming communities of our country, who by necessity if not by habit, have housed their employees upon their property. Notwithstanding the great technical and mechanical advancements that have been made in the farming industry, there still remains a great need for the farm laborer in order to harvest certain types of crops. The

supply of such labor in most farming communities of the north does not meet the demand of the farmer and, therefore, it is necessary to search for migrant laborers from the south to fill this need. In order to enhance the flow of the migrant worker to these northern fields, the farmer or company not only offers free housing to the worker, but also provides him with some degree of protection and security from those unwanted visitors, solicitors or con men who would take advantage of the hard working and generally uneducated employee who understands very little English.

To open these camps to any would-be visitor would not only violate the Fifth Amendment of the property owner, but also violate the right of privacy of the migrant worker, who works long hours in the fields to harvest the crops and deserves to be free from any outsiders during his rest period. To open said camps to the public would deter the flow of migrant workers to the northern agricultural communities, because of the want of security and protection which is now afforded to them; and would deter the landowner from offering free housing if to do so opens his land to the public thereby interfering with his private farming enterprise.

Recently there have been a few cases decided in the lower courts regarding privately owned labor camps which house migrant workers, such as *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971); *Folgueras v. Hassle*, 331 Fed. Supp. 615 (1971); *Franceschina v. Morgan*, (1972) and a recent case out of the United States Court of Appeals for the Fifth Circuit, No. 72-2057, *Peterson v. Talisman Sugar Corporation, et al*, May 3, 1973.

The court below relied upon *Franceschina* as support for its decision reversing the trial court and granting to respondents an absolute right under the First Amendment to go upon private property to seek out potential clients or members for their organization. The respondents themselves relied heavily upon the cases of *Shack* and *Folgueras*. However, in all of

these cases the camp owner denied for an arbitrary or discriminatory reason the tenant-employees' right to have a certain visitor, who was there generally to render medical or financial assistance to the tenant. However, even in the *Folgueras* and *Shack* cases, the courts therein held that these camps are not open to the public and that the camp owner may enact certain reasonable rules and regulations governing visitation to his camp, and that the rule requiring a visitor to name a tenant that he desires to see is, in fact, a reasonable rule and does not interfere wiith any First Amendment right of a visitor or of a tenant. The *Franceschina* case, goes a little farther than *Shack* or *Folgueras* in its application as to who may visit the camp and allow any would-be visitor to enter the camp regardless of company rules so long as the migrant tenant has no objects. This ruling seems to go too far and seems directly in conflict with *Central Hardware Co. v. N.L.R.B.*, 33 L.Ed. 2d 122 (1972), which more or less reaffirmed the private property rights to their traditional status and held,

> "Before an owner of private property can be subject to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes."

Franceschina, and the case at bar as held by the lower court would allow would-be visitors to roam through the open bay barracks at will, interfering with the privacy of some 200 other tenant-employees and the privacy of the company merely because one of the tenant-employees invited these would-be visitors to the camp. Furthermore, some lower courts, relying heavily upon the right of a would-be visitor under the First Amendment and their interpretation of that Amendment under *Amalgamated Food Employees Union Local No. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), and *Marsh v. Ala-*

bama, 326 U.S. 501 (1946), have held the private property owner as well as the police agency liable in tort for evicting the would-be visitors from these premises. Thus, the *Logan Valley*, *Marsh*, *Shack* and *Franceschina* cases have created a great deal of uncertainty, confusion and misunderstanding in regard to the respective rights and obligations of private property owners who house their employees upon their property; and in regard to petitioners obligation under the trespass statute, where the property owner's interests and rights come in conflict with would-be visitors and, thus create a disturbance. Enormous amounts of lower court time are being taken to resolve these conflicting interpretations. Arrest for trespass are continuing and officers and landowners alike are exposing themselves to tort liability for actions that they take in reliance upon their interpretation of their rights and obligations under the Federal Constitution and state statutes. The question should be settled by this Court.

II. This important question was wrongfully decided below.

Although this Court does not generally grant Certiorari to review evidentiary matter or discuss specific facts, it has done so when the decision below seems to be shockingly wrong, or where the decision was totally void of evidentiary support, or contrary to the Findings of Fact, or where an interpretation of the facts is necessary to determine a constituitional question, such as a violation of First Amendment right. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271; and cases cited 339 U.S. 605; *Berenyi v. Immigration Director*, 385 U.S. 630; *Thompson v. City of Louisville*, 362 U.S. 199; *Washington v. U.S.*, 357 U.S. 348. Furthermore, this Court will review the State's Court findings, "where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where the state court deprives a litigant of a federal right by omitting to pass on basic questions of fact;", *Fiske v. Kansas*, 274 U.S. 380;

Creswell v. Grand Lodge, 225 U.S. 246; *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697; *Carlson v. Washington*, 231 U.S. 103; and where federal protected rights have been invaded it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant necessary relief. *Bell v. Hood*, 327 U.S. 684, 90 L.Ed. 944, *Bivens v. Six Unknown Federal Narcotic Agents*, 29 L.Ed.2d 619.

The court below disregarded the facts of this case in order to avoid the only issue presented to the trial court, to-wit: whether respondents have an absolute right under the First Amendment to enter a company's private property without the necessity of seeking permission from the company or naming the tenant-employee that they intend to visit.

The respondents alleged that under the facts of this case the company does not have Fifth Amendment rights nor the protection of state trespass statutes, because it opened its land to the public by the mere fact that it houses its employees upon said land (making anology between the camp and the company town as in the *Marsh* case); and, therefore, respondents have an absolute First Amendment right to go upon said property without the necessity of abiding by any rules of the landowner.

The trial court met this issue headon and held that an owner of land, who does not dedicate to any significant degree that land to public use, has at least that right to make rules and regulations governing visitation upon said land so long as these rules and regulations do not unreasonably infringe upon the right of those tenant-employees residing on said property. The trial court further held that the rule requiring visitors to name the tenant-employee he desired to visit can in no way be interpreted as an infringement upon the tenant-employee or visitors' rights to any significant degree.

The Washington State Supreme Court totally disregards

these facts and issues and rendered a decision in regard to issues unsupported by fact or law. Petitioner contends that the court below was influenced by the social and political nature of this case, by the American Bar Association, which filed its brief as Amicus Curiae, by the office of Economic Opportunity, which also filed a brief Amicus Curiae, by a mass showing of force of members of the United Farm Workers Union, which packed the courtroom during the oral arguments, by a certain article written by respondent Fox, which appeared in the November, 1971, issue of the Washington Bar News (Appendix C); and not by the facts. This article was written by Fox after his arrest and prior to the trial on the facts. It clearly put the petitioner and company in a most unfavorable light as the oppressors of the poor and makes the respondents out as the advocates of the poor and oppressed. The Washington Bar News is sent to all of the Justices of Washington Supreme Court.

The decision of the court below in effect violated the Fifth Amendment rights of the company by holding that an attorney and a labor organizer have a First and Fourteenth Amendment right to go upon private property to seek out potential clients. The court below cites for its authority, *Brotherhood of R.R. Trainmen v. Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L.Ed.2d 89, 84 S. St. 1113, 11 A.L.R.3d 1196 (1964); *NAACP v. Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963); *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n.*, 389 U.S. 217, 19 L.Ed.2d 426, 88 S.Ct. 353 (1967). *Franceschina v. Morgan*, 346 Fed. Supp. 833 (S.D. Ind. 1972). These "right to counsel" cases are not applicable to the facts of this case, since they deal with the right of a union or other organizations to refer personal injury claims of its members to certain union approved attorneys and the right of those attorneys to accept said cases. The holding in said cases do not concern themselves with an alleged right of an attorney, uninvited, to enter private property against the owner's wishes, to seek out po-

tential or prospective clients which he had never seen or conversed with, and are, therefore, inapplicable.

Without going into the merits of whether or not *Franceschina* is good law in light of such cases as *Adderly v. Florida*, 385 U.S. 39, 17 L.Ed.2d 149; (1963) *Central Hardware;* and *Lloyd Corporation v. Tanner*, 407 U.S. 551, (1972) it is appellant's contention that said case is not applicable to the fact situation of the case at bar. It is true that at first blush *Franceschina* appears to be quite similar in point in that the property in question was an agricultural labor camp owned by a food processing company which offered free housing on said camp to migrant workers; and that the would-be visitor was to some degree, associated with or passed out literature concerning the United Farm Workers AFL-CIO. However, the similarity of these cases end at this point. Unlike the labor camp in *Franceschina*, which camp was dedicated solely to house migrant workers, the camp in question housed all of the owner-employer's farm equipment, shop and office, as well as a two-story home where a tenant, other than a migrant worker, resided. Furthermore, *Franceschina* was forbidden access to the camp on the grounds that he had long hair, liberal, a socialist, and had participated in passing out pamphlets concerning workers' rights to organize for the purpose of collective bargaining and other benefits of organization. In the case at bar no would-be visitor, regardless of race, color, creed, association, short hair or long hair, was ever denied access to the migrant workers to distribute any information they so deemed proper so long as they abided by the reasonable rules and regulations set down by the company. In fact the trial court's uncontroverted Finding of Fact No. 32 showed, "that had appellants (respondents facts, Fox and Gamboa) sought permission from the company to talk with anyone or all of said tenants at said camp, said permission would have been granted and a place made available at a time convenient to all concerned." Finally, the facts in *Franceschina* presented the court with the question. "whether or not the owner of land may law-

fully prescribe who may talk to his tenants, and monitor any conversation which may be permitted." The facts in the case at bar are clearly distinguishable from those which presented that question in *Franceschina*. In the case at bar there has been no contention by respondents nor has there been any evidence to show that the owner-employer had ever attempted to limit visitation or discriminate against the visitor of any tenant or monitor any conversation between the tenant and visitor. The evidence clearly shows that the only restriction upon any visitor was merely a requirement that if he intended to visit with any certain employee-tenant that he name that employee-tenant in order that he may be located and a space made available for their visitation which would not interfere with rights of other employee-tenants or the rights of the company. *Franceschina* is, therefore, inapplicable and does not support the decision below.

One very important fact, which the court below totally disregarded, should be pointed out and that is that there was not a scintilla of evidence to show that any tenant-employee who was present at the camp on June 19, 1971, ever wanted or invited the respondents to come upon or remain at said camp or even knew who the respondents were or what they represented. On the night in question the respondents cited the case of *State v. Shack* as their authority to come upon said camp without the necessity of naming the tenants they desired to see. Although the facts of *Shack* are also not applicable to the case at bar, petitioner contends that *Shack* is not authority for respondents position, but rather authority supporting company's position to make reasonable rules and regulations in regard to visitation to his property. It is true that *Shack* held that property rights served human value and they are recognized to that end and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon his premises. Thus, a man's right in his real property is not absolute and one cannot use his property as to injure the rights of others. What the respondents failed

to point out and which *Shack* held is the following:

> "It is not our purpose to open the employer's premises to the general public if in fact the employer himself has not done so. We do not say, for example, that solicitors or peddlers of all kinds may enter on their own; we may assume for the present that the employer may regulate their entry or bar them, at least if the employer's purpose is not to gain a commercial advantage for himself or if the regulation does not deprive the migrant worker of practical access he needs. And we are mindful of the employer's interest in his own and in his employees' security. Hence he may reasonably require a visitor to identify himself, and also to state his general purpose if the migrant worker has not already informed him that the visitor is expected."

Thus, *Shack* does not give respondent First Amendment right to go upon private property.

This court has unequivocally stated that people who want to propagandize or protest do not have a constitutional right to do so wherever or whenever or however they please. *Adderly v. Florida.* Traditionally (and under Washington Law), a private property owner's rights to exclusive possession and control of his land is protected by state common law and statutory trespass laws; *Martin v. City of Struthers*, 319 U.S. 141, and the rights of private property owners, created by state law, are guaranteed by the Fifth Amendment to the Constitution of the United States. *N.L.R.B. v. Babcock and Wilcox Co.*, 351 U.S. 112.

Although respondents do not have a First Amendment right to go upon company's camp uninvited, petitioner does recognize that there will be situations where valid First Amendment rights of would-be visitors or labor organizers or even attorneys may well come in conflict with the Fifth and Fourteenth Amendment rights of a private property owner. However, when said rights do come in conflict with each other there must be an accommodation made based upon the facts

of each individual case. The accommodation must be obtained with as little destruction of one right as is consistent with the maintenance of the other. The accommodation in this case was not made by the court below.

This court has clearly established a right of a private property owner to control conduct on his land, and, therefore, Certiorari should be granted to review the contrary conclusion of the court below.

CONCLUSION

For reasons stated above, the Petition for Certiorari should be granted.

Respectfully submitted

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APPENDIX

APPENDIX A

[No. 42339. En Banc. MAY 24 1973

THE STATE OF WASHINGTON, Respondent, v. MICHAEL J. FOX et al., Appellants.

[1] Landlord and Tenant--Relationship--Inhabitant of Work Camp--Invitees. Workers living in a work camp have the rights of tenants in the matter of inviting others onto the premises.

[2] Attorney and Client--Constitutional Law--Right to Counsel--Basis. The first and fourteenth amendments to the federal constitution assure the right to counsel.

[3] Labor Relations--Labor Organizations--Activities--Access to Workers. Under RCW 49.36, which deals with labor unions in general, reasonable contact with workers by a union representative for any lawful purpose is an activity protected from prosecution.

Brachtenbach, J., did not participate in the disposition of this case.

Appeal from judgments of the Superior Court for Walla Walla County, Nos. 60010, 60011, Albert N. Bradford, J., entered February 28, 1972. Reversed.

Prosecution for trespass. The defendants appeal from convictions and sentences.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent,	)	No. 42339
v.	)	EN BANC
MICHAEL J. FOX and GUADELUPE M. GAMBOA, Appellants.	)	FILED MAY 24 1973.

WRIGHT, J. -- This action is an appeal from a conviction for trespass, a misdemeanor. Appellants were convicted in district court in Walla Walla County and fined $25 each. They appealed to the Walla Walla County Superior Court and were again convicted after a trial to the court without a jury and received the same fine. Following the conviction in superior court, appellants appealed directly to the supreme court.

Appellant Michael J. Fox is an attorney at law. He was employed full time by the Seattle-King County Legal Aid

Bureau, Inc. In that capacity he rendered legal services to persons who were unable to pay for such services. He charged the client nothing and was compensated only by his salary.

Appellant Guadalupe M. Gamboa is an organizer employed by the United Farm Workers Organizing Committee, AFL-CIO, a labor organization for migrant farm workers.

Appellants will hereinafter be referred to as "Fox" and "Gamboa". Rogers Walla Walla, Inc. is a corporation engaged in farming, and will hereinafter be referred to as "Rogers".

Rogers leases a tract of land about three miles south of Walla Walla, known as Rogers Labor Camp. In the camp in June of 1971, were housed about 220 male migrant workers who had come from Texas to work harvesting asparagus. Most of the workers spoke Spanish and few, if any, had any significant knowledge of English.

The workers were employed by contract for a season of 6 to 8 weeks. They lived in the camp and paid $2.75 per day for board and room. Located within the camp area are the company office, a mess hall, store, recreation room, laundry facility, shop, shed to house the company's farm machinery, and a house occupied by a tenant who was not one of the migrant workers.

The only telephone in the camp was located in the company office. Any worker desiring to use the telephone had to seek permission. The workers were transported to and

from the fields in company trucks.

On June 15, 1971, Gamboa and other union representatives went to the camp and talked to a number of the workers, including one Alfonso Romo. Gamboa had a discussion with Romo about the latter's legal rights under his employment contract. Gamboa suggested that Romo talk to an attorney, and Romo agreed. Several of the workers asked Gamboa to return as soon as possible because they wanted to have matters about a bonus and other problems clarified before their return to Texas. On that date, Gamboa and at least one other union representative identified themselves at the company office and talked to a Mr. Mendoza, the company supervisor on duty. They had no difficulty and were not asked to leave.

On June 16, 1971, Gamboa went to Seattle and contacted Fox, informing him the workers were desirous of having a lawyer come to the camp. Fox agreed to go and proceeded to read the contract and other documents which were furnished him. He also read applicable case law.

On Saturday, June 19, 1971, both Fox and Gamboa entered the property leased by Rogers at about 5:10 p.m. That was at a time when it was daylight, but was not during working hours. Appellants were accompanied by Irwin Nash, a journalist and photographer, and by Sandy O'Brien and Patricia Cope, 2 young ladies who were employed by the union during the summer months.

They were in an automobile belonging to Fox.

Upon turning off the public road, appellants and the other occupants of the automobile went past a "No Trespassing" sign and proceeded up a dirt road between an eighth and a quarter of a mile to the camp. There they were met by a Mr. Bernard J. Lang, who was a supervisory employee of Rogers. Lang also appears to have held a commission as a special deputy sheriff.

Mr. Lang met the automobile, noted the license number, and conversed with Gamboa. Gamboa said he wanted to talk to some people and walked away. Fox showed Lang his Washington State Bar Association card and stated he was an attorney and had come to see some people who had asked to see an attorney.

There was some argument between Lang and Fox, in which argument Lang asked Fox if he had the permission of the company to be present, and whom he wished to see. Fox stated he did not need permission to be present and was not required to state whom he wished to see. He cited some case law on the matter.

After some discussion, Lang called his company superior and was told that if the appellants did not have permission from the company to be present, they would have to leave. Lang communicated this to Fox, who continued to remain on the premises. Lang then called the sheriff's office. Two deputy sheriffs came and told Fox and Gamboa to leave. The others, Miss O'Brien, Miss Cope and Mr. Nash, left the premises. The arrest of Fox

and Gamboa soon followed.

In view of our disposition of this case, it will not be necessary to consider all of appellants' contentions. The workers paid for the right to live in the camp and enjoyed the status of tenants. Franceschina v. Morgan, 346 F.Supp. 833 (S.D. Ind. 1972). As such, they had the right to invite others onto the premises. Konick v. Champneys, 108 Wash. 35, 183 P. 75 (1919).

The other and more important issues are whether Fox, as an attorney, had a right to go where he could consult with potential clients, and whether Gamboa, as a labor organizer, had a right to go where he could contact workers.

With regard to Fox, the cases are many in which it has been held that First and Fourteenth Amendment rights include the right to counsel. Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 12 L. Ed. 2d 89, 84 S. Ct. 1113 (1964); N.A.A.C.P. v. Button, 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963); United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967).

In the present case Fox merely remained on the Rogers premises and waited for Gamboa to find the men who wished to talk to him. Under such circumstances, Fox had a lawful right to be there.

With regard to Gamboa, the law is clear that a union organizer has a right to go where necessary to meet with workers, as long as his exercise of that right is reasonable. The right here was exercised outside of working hours and during the daytime.

The law relative to the right of labor organizers is set forth in Franceschina v. Morgan, supra. In addition to numerous cases from the federal courts and from other states, there is one case in Washington worthy of note, Kimbel v. Lumber & Saw Mill Workers Union, 189 Wash. 416, 65 P.2d 1066 (1937). Therein at page 419, we said: "Under the law, workmen have the right to organize and form unions." Following that statement is a quotation from a statute which is now codified as RCW 49.36.010:

> Unions legalized. It shall be lawful for working men and women to organize themselves into, or carry on labor unions for the purpose of lessening the hours of labor or increasing the wages or bettering the conditions of the members of such organizations; or carry out their legitimate purposes by any lawful means.

(Emphasis supplied.) Another statute which is pertinent to the problem is RCW 49.36.030, which reads:

> Prosecutions prohibited. No person shall be indicted, prosecuted, or tried in any court of this state for entering into or carrying on any lawful arrangement, agreement, or combination between themselves made with a view of lessening the number of hours of labor or increasing wages or bettering the conditions of working men and women, or for any lawful act done in pursuance thereof.

(Emphasis supplied.)

Upon the authority of modern constitutional, decisional and statutory law, we hold the appellants herein had a lawful right to be at the labor camp at the time they were arrested. They committed no crime and therefore the judgment of conviction is hereby reversed and the charges against appellants are dismissed.

Wright, J.

WE CONCUR:

HALE, C.J.

FINLEY, J.

ROSELLINI, J.

HUNTER, J.

HAMILTON, J.

STAFFORD, J.

UTTER, J.

APPENDIX B

In the Supreme Court

OF THE

STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL J. FOX et al.,

Appellants.

No. 42339

Department

ORDER

DENYING

PETITION FOR REHEARING

The Court having considered the respondent's petition for rehearing herein,

It is ordered that the petition be and it is hereby denied.

Dated this 17th day of July, 1973.

By the Court:

Chief Justice

82 Wn.2d 289

APPENDIX C

Volume 25, Number 10
November 1971

WASHINGTON STATE BAR NEWS

FARMWORKERS IN THE YAKIMA VALLEY

FARMWORKERS IN THE YAKIMA VALLEY

By Michael Fox

I should say at the outset that I don't represent the United Farmworkers Organizing Committee. I am not a spokesman for the union and any comments I make should not be interpreted as the union's official position on any matter. However, I have been very closely associated with a large number of members of the union and have worked on several cases which have been brought because of labor law problems.

In order to lay a little background, I would just like to make a few remarks on what the fate of the farmworkers in the Yakima Valley is and to attempt to lay a little groundwork so that you will understand how the union movement came into creation there and what has gone on in the past year.

The farm work in the Yakima Valley is largely done by various groups or divisions of people. The first is the racial division, being the Chicano farmworkers and the Anglo farmworkers. They paradoxically enough work on different crops. You will very rarely find a crew of farmworkers at a particular ranch that is genuinely multi-racial unless they are perhaps Chicanos and Blacks. There are very few work crews that will be, say, half Anglo and half Chicano.

The Chicanos in the Yakima Valley primarily work in the much more difficult and in the much more back-breaking work. They work in hops. I don't know if you have ever seen a hop field but it has poles about as high as this room and long strings between the poles. The vines grow up and down these strings. It is very difficult work cutting them off and loading them into the truck and bringing them back to the shed.

They also work on beets, which is stoop labor. It consists mostly of thinning beets. There is also the picking of asparagus, which is very difficult back-breaking work. The worker has a little blade and goes out, stoops down, and cuts the asparagus from the ground.

The Anglos in the Yakima Valley work primarily in tree crops: peaches, pears, cherries, and apples, for example. It is a higher pay type of work and it is a type of work that is often done by authentic migrants who spend their lives following the harvest. In fact, during the apple season, you will find a lot of Anglo migrants sleeping on mattresses in the open down by the Yakima River.

It is an incredible life which I'm sure a lot of you here have never seen. It's something that I had never seen. I have seen migrant labor camps in the South and in other parts of the country, but I had never seen some of the ways that white Anglo migrants live in the Yakima Valley.

The other division is between the permanent residents and the migrants. A lot of the people who do farm work in the Yakima Valley are permanent residents. They are not really migrants. Some of them live in migrant labor camps part of the year. Others travel from state to state, primarily from Texas up through Colorado or California. Then it's back down again. The journey is repeated over and over. This is just their life. I ask you to imagine the effect that this incessant travel has on the schooling of their children.

Excerpts from a speech delivered by Michael Fox, a staff attorney for Seattle-King County Legal Services, at the September 15, 1971, luncheon of the SKCBA Young Lawyers Section.

Michael Fox

The heaviest permanent concentration of Chicanos in the state is in the Yakima Valley and the Columbia Basin, primarily between the cities of Yakima and Pasco. Little towns like Sunnyside, Granger and Outlook are where you find a heavy concentration of Chicanos, many of whom work in farm labor during some time of the year. Some have other jobs in other times of the year. However, the typical pattern for a resident farmworker is that he is employed during part of the year on some of these crops and will be on welfare for the rest of the year.

It's a very vicious cycle, especially when you're in the migrant situation. There is really no exit from it. During the major crops, such as hops, a large amount of hand labor is required in contrast to the crops which demand very little hand labor like wheat, which is all done by mechanical combine. During the harvest of major hand labor crops, you will find a very heavy influx of migrants into the Yakima Valley. At this time, hops are being harvested in the Yakima Valley and you will find the population of the Chicano farmworkers in the Yakima Valley is increased by more than 1,000 just due to hops and hops is a comparatively small crop when you compare it to something like asparagus, where major corporations like Del Monte, Stokeley and Libby will hire several thousand migrants.

The Yakima Chief Hop Ranch

Now to explain what happened on Labor Day of 1970 when union organizing really began. Workers were engaged in working at the Yakima Chief ranch, the largest hop ranch in the Yakima Valley in terms of acreage. One day, two of the workers were talking during a lunch break about how it was not the best type of life to work seven days a week, 11 hours a day and to get a $1.60 an hour. Those were the wages at the Yakima Chief hop ranch during the 1970 harvest.

Shortly after that they talked with other workers and a strike broke out. All 200 workers at the ranch went out on strike. Anyone who knows anything about labor history will agree that that is a pretty amazing way for a strike to begin. The Yakima Chief workers did not have trained organizers coming in, telling people about unions and telling them what they could get when they struck. That's not how it happened. It happened because workers were so fed up with the conditions that they were being forced to live in year after year. They just went out on strike.

Perhaps misery is the best organizer. That is the only message that I can come up with. Shortly after that there was a leadership that developed among the workers. They contacted our office about some kind of assistance. So I went out to the Yakima Valley about four or five days after this first strike had occurred. By then the strike had spread to several other ranches.

By that time agreements had been reached with seven or eight of the ranchers. Their agreements would make any lawyer laugh. They were written on old pieces of paper. They said "I promise to do this," and they were only signed by one party. Most of them were not even legal contracts. What they did do was to provide for an increase of wages to $2 an hour. In certain cases, there were specific demands for removal of certain foremen with whom the workers didn't get along very well.

The one strike to which I was a witness was just incredible. I had never seen anything like it in my life. The union leadership rolled up to a particular ranch, got out and started yelling "huelga," "huelga" — which means "strike," "strike."

It took just about 15 minutes for all the workers at that ranch, none of whom knew the strike organizers, to leave the fields. The strike was concluded in about four hours because the hops were sitting on the vines and they spoil in about three days. Shortly after this strike the workers voted to affiliate with the United Farmworkers Organizing Committee (AFL-CIO), which is led by Cesar Chavez.

One episode that I did personally participate in was assisting the union leadership draft up a small contract with two particular growers who were engaged in a cooperative harvest. I went with them when they negotiated it. One of the growers signed the contract. After that was done I left the valley and came back to Seattle.

What subsequently occurred at that particular ranch later gave rise to a very significant lawsuit, *Garza v. Patnode* [Benton County Superior Court No. 25255], which we tried in January of this

year. When the farmworkers' representatives came back to negotiate this contract with the other grower — the one who had not already signed — they found themselves thrown off the property. As soon as they were thrown off, both of the growers and some of the Anglo employees armed themselves with shotguns. They took these shotguns and they paraded around the area of the hop processing plant where their workers were concentrated. That was the end of any union at this particular ranch. That was the end of the strike and that was the end of all organizational activity at this ranch.

The complaint in *Garza v. Patnode* alleged that by these actions, the two growers involved had interfered with the organizational rights of the farmworkers. This is pretty clear. The only problem is that farmworkers are not covered by the National Labor Relations Act which grants all workers the right to organize free of employer harassment and there is no comparable act in the State of Washington.

We were able to file this case because of the landmark case of *Krystad v. Lau*, 65 Wn.2d 827, 400 P.2d 72 (1965), won by Hugh Hafer of Seattle, which said that all workers in the State of Washington really have a right to organize free of employer harassment by virtue of the policy declaration section of the little Norris-LaGuardia Act [RCW 49.32.020].

When we filed this case, we didn't expect to break any new legal ground but we were breaking some new political ground in that farmworkers had never sued growers in the Yakima Valley on a problem like this. Growers thought that they could do anything they pleased.

There was a two-week trial and a permanent injunction was eventually obtained prohibiting the growers from interfering with the organizational rights of their employees. The decision somewhat changed the atmosphere in the Yakima Valley, where now every grower knows that if he intimidates his workers when they are attempting to organize a union, he can be slapped with an immediate lawsuit with damages and injunctive relief.

It certainly has not changed the atmosphere to any dramatic degree, however. You will find that since the strike last year there is now blacklisting going on in the Yakima Valley. If an individual was prominent during the strike, he will often show up and ask for work and he will find that there is no work for persons named Garza or Gonzales because they will know that that particular family participated in the strikes of 1970.

Rogers Walla Walla Company

In June of this year, Lupe Gamboa, who is the prime organizer for the union along with Roberto Trevino, came to our office in Seattle and told us about the camp at Rogers Walla Walla Company in Walla Walla. They had been there the week before and had been confronted with a great mass of legal problems. The most shocking was the arbitrary denial of what is called "bonuses," which the migrant workers at Walla Walla were supposed to get. By contract they were supposed to get a bonus of ten cents an hour if they stayed till the end of the harvest and if they did their work. That's about all the contract says. This system is really not a bonus system but a device the growers use to keep their labor forces in their employ for the duration of the harvest.

The elimination of the bonus system in the hop fields was one of the big issues during the harvest in the valley in 1970. So it was decided at this meeting, when he told us about this, that we would go out and look into this and determine if any legal action could be taken.

I drove out to Walla Walla on a Saturday morning and picked up Gamboa along the way. He had already been to the camp. We picked up several other people and went down to Walla Walla. When we drove into this camp, the first thing we saw was a man in a sheriff's uniform with a holster and gun on his side.

I was a bit curious as to what he was doing there. He immediately confronted us and asked us what we were doing and I said that I was a lawyer and showed him my bar card. I stated that I was there to see people who requested legal assistance. He wanted to know their names. I said I wouldn't give him their names. This was because of the fact that workers who have become involved with the union and who had become involved with lawyers have been blacklisted and have been mistreated in other ways by other growers in that area.

This fellow in the sheriff's uniform, we later heard, was not a sheriff but was working for the Rogers Walla Walla Company and was given permission by the sheriff's department to wear the sheriff's uniform. We learned at our Justice Court trial that he was carrying the pistol without a permit.

We began talking in Spanish with the workers about the bonus system. They were telling us how names were posted in the dining hall of those who would be denied the bonus, say for sleeping-

in over an hour. This was not in the contract. We thought that we had a pretty good case.

About five minutes after we started talking to these workers, the Walla Walla sheriff's department car drove up. Two officers got out and asked who was in charge. Gamboa said he was. They started interrogating him and I remembered that this other fellow with us had a tape recorder in his brief case. I told him to take it out and the rest we have on tape.

I don't really want to go into what was said at that point because we are going to have another criminal trial very shortly.

We were arrested [on June 19, 1971]. After that it really takes on the air of Alice's Restaurant. A law enforcement attorney for Walla Walla County came down and he wanted to know why we were there and why we had the nerve to drag him away from his Saturday afternoon martini on the veranda. At that I just about passed out. Here is this guy sitting there in his pink bellbottoms, drawn away from his dry martini on the veranda while these farmworkers are out there eating this slop in the camp and where I had been arrested because I was trying to speak with the workers about their legal problems. And he really wanted to know why we dragged him away by having the audacity to get arrested because we wanted to go there to talk to the workers about the problems they had.

I want to show you some pictures which we took the next day. This is the interior of a Walla Walla Rogers Company migrant labor camp shed. There are forty people who live in this room. If you are not shocked by this, I am surprised. This room is a metal quonset hut. It sits out in the middle of an open field where the temperature gets to about 95° and it beats on that metal and the temperature inside is about 120°. I have never seen anything worse in any labor camp I have ever been in.

After I had been released on my personal recognizance by the Walla Walla County Sheriff's Department and after I got back to Seattle, I called Don Horowitz, who is the chief attorney general for the State Social and Health Services Division. I told him that I thought there were probably some health violations at this ranch. Don saw that an inspection team visited the Rogers Walla Walla labor camp shortly thereafter, and I have a copy of the attorney general's inspection report.

To show you what the atmosphere is in these communities, the attorney general's office was willing to do this but the Walla Walla County Health Department didn't want any part of this. They really had to be bullied into doing it by the attorney general's office and the State Social and Health Services Division. Here we have a camp with 190 men, all brought up from Texas and they

Interior of a Walla Walla Rogers Company Migrant Labor Camp Shed

live in this place for three months without families and without any individual kitchen facilities in the barracks. They go to a mess hall where they pay for their meals every day. However, as the report points out, no detergent is used for washing the dishes; they are cleaned by force of water. That doesn't do much for the germs that are on the plates. That's some idea of what this place is like.

The food storage is another item that is mentioned in here. It's put a little bit politely in the report ["rodent-infested food"], but in fact the food was full of rodent crap. That's just another example of what this place is like.

The men paid for these meals and room, by the way. They were not provided by the Company.

The men also had an opportunity to become intimately acquainted with their bed linen. They were not given any change for three months. Mattress covers were not issued. They were required to be furnished by state law. They were not provided at all.

Mr. Gamboa and I were tried in Justice Court in Walla Walla and were found guilty of criminal trespass [on July 9, 1971]. Our argument was basically that we had a right to be there and we didn't have to have the permission of the Company. Property rights must take a back seat when in conflict with first amendment rights, i.e., the right to association, free speech, and the right to civil counsel. Property rights must take a back seat to these types of associational rights. I think these two criminal cases will develop into major test cases. [The Superior Court trial is set for December 9, 1971, in Walla Walla.]

The right to organize — which is the victory we won last January — really means very little from a practical labor law point of view if labor organizers cannot go in and see the farmworkers in order to organize them. There are several U.S. Supreme Court cases construing the National Labor Relations Act that say if the organizers cannot go to see the workers which the employer has isolated from the union then the right to organize means nothing. The same argument can now be made by virtue of state law.

The issue involved in my own case is the right for anyone to see a lawyer or the right of a lawyer from a federally funded legal assistance program to go in to see people who are eligible for and who have requested his services. I don't think that's going to be a very difficult argument to prevail upon in a higher court.

We decided to use one other vehicle to try to establish these rights of free access to labor camps as well and since the time of my arrest I have sued [on June 25, 1971] in Federal Court in my own capacity both the Rogers Walla Walla Company and the Sheriff's Department in Walla Walla alleging a federal civil rights conspiracy; our allegations are that these agencies, under the color of state law, worked together to deprive both me and the migrants of certain rights that are guaranteed us by the Constitution, primarily the First Amendment.

Question and Answer Period

Ed Raftis: Do the migrant workers have any trouble getting legal representation from the Walla Walla or Yakima Bar?

Fox: Well, in auto accidents, they don't.

John Darrah: Mr. Tonkoff said they had no difficulty in getting an attorney.

Fox: In what kind of case? Would he represent a migrant worker in a labor case?

John Darrah: No minorities had any trouble in getting any representation.

Fox: That may be true in a lot of traditional-type cases. For instance, an auto accident case. I do want to say, however, that there has been no labor law litigation and no quasi civil rights litigation on behalf of Chicanos in the Yakima Valley, save that initiated by the ACLU project that was in the Yakima Valley several years ago and by my office. None of this has been done.

One thing you have to realize is that these cases are not fee-generating. The damages in a labor law case, where say an employee has been discharged, are going to be minimal. They are going to be the amount of his wages lost. It is going to be very difficult, first of all, for the Chicanos to get a lawyer to represent them against what are really the main clients in the Yakima Valley, the growers. That is where the conflict is. It is with the growers.

The Bar out there, face facts, lives on the grower. As a Yakima Valley lawyer has remarked to

me, "Every dollar that comes into the Yakima Valley comes down the irrigation ditches."

I think that the lawyer who decides he is going to start representing the Chicano farmworkers against growers is going to have a very tough time staying in business.

Ed Raftis: Why isn't there OEO Legal Services in the Yakima Valley?

Fox: It is my understanding that an application was submitted this past year by a fellow named Tomas Villanueva from the Yakima Valley who has been very active in the Chicano community. But it was turned down by the National Legal Services Program, although the Yakima Valley was recommended by National Legal Services officials as the area in the country that is most sorely in need of a Legal Services Program. It was turned down, as I understand it, for lack of money on the part of the National Legal Services Program.

Charles Ehlert: When I was over there in 1968 for a short time, realizing that I would be leaving, I developed some contacts with lawyers in an attempt to try to get them to pick up where I had left off and to take on some of the cases that needed to be brought.

In several cases, there were lawyers sympathetic to us and to what we were trying to do. It came back to me and they told me that their partners were going to be offended if they undertook something like this. This was because their partners represented the growers and the friends of the growers who would be sued in this case.

Fox: You have to realize that the Yakima Valley is a totally agricultural area. There is really very little industry, save Boise-Cascade between Pasco and Walla Walla. Everybody depends on agriculture. Once you get into a situation where there is this type of conflict, there is a real problem in getting representation, especially because the law firms are so small.

Charles Ehlert: This is one of the best arguments that I can think of against having a judicare plan over there. A judicare program in a community like that would probably produce a fair number of divorces and maybe even wage recoveries but it is very unlikely it would bring about any institutional change.

Fox: In my office, we are not attempting to provide a case service approach to the Yakima Valley. We are not handling any divorces. We are not handling any kind of minor cases. The only cases we are handling are those cases which we think are going to have some kind of effect on institutions in the Yakima Valley, specifically those cases which are going to have a daily effect on farmworkers.

John Darrah: It seems to me that this is a project in which the Bar might very well be interested. The economic fact that people in this Valley cannot get lawyers seems to me to be a State Bar Association concern of the greatest magnitude.

Fox: You are going to find that the Bar in Yakima is going to disagree with you. They will say that "certainly they can get lawyers"; "I have eight Chicano clients now"; and they will be on those kind of cases that they want to handle.

John Darrah: Right, but you have the lawsuit going in federal court and the Bar may be of great support in that, especially in light of what happened at the annual meeting in Portland.

Let me ask you, is there any problem coming on you or your office from the OEO?

Fox: Jack Kent is right in back of you. Why don't you ask him? He is an OEO official. I really don't know. I've never received any pressure from anybody in OEO. The only

(Continued on page 28)

(Continued from page 10)

type of pressure that I have received has been from people like from the growers, who make these statements in the press to the effect that the farm worker's union and all people associated with it are communists and their lawyer wears a red arm band and things like that — because I was wearing a red arm band to identify myself as a non-grower during the strike. Somehow that makes me a Red or something.

This past weekend, a fellow from the Yakima Bar came up to me at the Bar convention and looked at my nametag and said, "You know, you don't look like such a bad guy. The lawyers out there think you are the devil incarnate."

If they do, I guess that is just what I have to live with. But I haven't really felt any pressure from them and I don't think anyone in our office has.

Charles Ehlert: There was a study done by a committee of the Washington State Bar Association in 1968, about the need on a statewide basis for legal services. A report was prepared which recommended against this. It would be very interesting reading for everyone interested. It concluded that the Legal Services Program that was provided in the city areas was not needed in rural areas because the rural poor were not a threat to the community. This is a very interesting posture for the Bar Association to be in.

"The rural indigent, however, presents a different problem. He is generally not a threat to the community, and his needs, while just as desperate, are borne with stoicism."

Report of WSBA Special Committee on Legal Assistance Programs September 1968

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-653

THE STATE OF WASHINGTON,
Petitioner,

vs.

MICHAEL J. FOX and GUADALUPE M. GAMBOA,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

I. Where a state criminal conviction is reversed by the State's highest court upon independent grounds of state law, does the United States Supreme Court have jurisdiction to review that reversal?

II. Does the First Amendment protect a labor organizer and an attorney from prosecution under a state criminal trespass statute when they go upon the privately owned premises of a migrant labor camp in order to speak with migrant laborers resident in the camp who have requested their services?

ADDITIONAL STATUTES INVOLVED

The pertinent statutes of the State of Washington (R.C.W. 49.36.010 and R.C.W. 49.36.030) are set forth in the Petition for Writ of Certiorari at App. 7.

STATEMENT OF THE CASE

The Petitioner's statement of the case, set out on pp. 4-8 of its Petition for a Writ of Certiorari, seriously misstates the facts of this case, includes allegations not reflected in the record below, and ignores numerous facts upon which the Supreme Court of the State of Washington based its unanimous reversal of the Respondents' convictions. Rather than attempt to reconstruct the facts of this case, the Respondents respectfully refer the Court to the opinion of the Supreme Court of the State of Washington, set out in Appendix A of the Petition and published at 82 Wn. 2d 289 (1973). The most important facts concerning the case are recited within that opinion and are supported by the record.

The following is an abbreviated recitation of the relevant events. The Respondent Fox is an attorney. (St. 93, 98, 215-217.) The Respondent Gamboa is a farm labor organizer for the United Farm Workers Union, A.F.L.-C.I.O. (St. 188-189.) On June 19, 1971, the Respondents were arrested for trespass within a migrant labor camp utilized by Rogers Walla Walla, Inc. to house asparagus cutters during the harvest season. (St. 5, 32, 111.) Several days earlier, the Respondent Gamboa had visited the camp, and spoken

with Alfonso Romo and several other workers who had impressed him with their need for legal assistance to help them in a contract dispute with Rogers Walla Walla. The two Respondents had come to the camp on the day in question in response to these requests for assistance. (St. 95, 127-130, 134-135, 142-147, 152-153, 189-190, 199, 203, 303; Def. Ex. 3, 22 [excluded St. 125], 23, 24, 26.)

At about 5:10 p.m. on June 19, 1971, the Respondents, accompanied by Irwin Nash, a journalist and photographer, and by Sandy O'Brien and Patricia Cope, two summer employees of the union, arrived at the camp. (St. 24, 226-227.) Immediately upon arriving Fox identified himself as an attorney to Bernard J. Lang, the camp guard, and showed Lang his Washington State Bar Association membership card. (St. 27, 35, 229; Def. Ex. 32.) Lang believed, at that time, that Fox was in fact an attorney. (St. 35, 56.) Lang, nevertheless, challenged Fox's right to be on the premises, and upon orders from his superiors, called the sheriff's office. (Petition for Writ of Certiorari, App. 5.) Prior to the arrival of the sheriff's deputies, Gamboa had introduced Fox to several workers within one of the barracks and Fox had begun to interview and advise them. (St. 233-235.) The arrival of the deputies abruptly terminated this attorney-client relationship. The deputies told the Respondents to leave, and thereupon the three people who had accompanied the Respondents left the premises. Shortly thereafter the Respondents were arrested and removed from the camp. At all times, the

Respondents and the persons accompanying them acted in a peaceful fashion. (St. 25-61.) Irwin Nash, the photo-journalist, who had come to the camp with Fox and Gamboa, tape recorded virtually every word exchanged, between Fox, Gamboa, and the arresting officers prior to the arrest, and the tape and written transcript of this conversation were admitted into evidence. (Def. Ex. 21, 19.)

REASONS FOR DENYING THE WRIT

I

THE DECISION OF THE SUPREME COURT OF WASHINGTON IS BASED ON INDEPENDENT STATE GROUNDS AND AS SUCH IS NOT REVIEWABLE BY THIS COURT.

The Petitioner has not stated a serious question before this Court. The Petitioner is asking this Court to review anew the evidence in this case,[1] although the highest court of the State of Washington has ruled that the evidence in the record does not meet the requirements for conviction under the applicable state statute. Yet this Court has held that the decisions of the highest court of a state on matters of state law are in general conclusive upon this Court. *Huddleston v. Dwyer,* 322 U.S. 232 (1943).

The decision by the lower court was grounded on the finding that no criminal violation was proved under Washington State law. First, the court below found as a matter of state law that the migrant workers, as tenants, had a right to invite the Respondents

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[1]See Petition for Writ of Certiorari, p. 4.

onto the premises. *Konick v. Champeneys,* 108 Wash. 35, 183 P. 75 (1919). Second, the court ruled that the Respondents having been invited, had a right to be on the premises. The Respondent Gamboa had a right of entry on the premises as a labor union organizer. And the Respondent Fox, an attorney, had a right of entry on the premises to provide legal counseling services to workers through the labor organization represented by the Respondent Gamboa.

These rights, of course, are recognized generally by federal, as well as state law. Hence the Supreme Court of Washington discussed certain leading federal cases as well as state statutes and precedents. However, the holding below was based on the proposition that, when the Respondents entered upon the premises of the migrant camp, their rights to so do were safeguarded under Washington state case law, *Kimbel v. Lumber and Sawmill Workers Union,* 189 Wash. 416, 65 P.2d 1066 (1937), and under two Washington statutes R.C.W. 49.36.010[2] and R.C.W. 49.36.030.[3]

This Court will not reexamine the judgment of a state court merely because a federal question may

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[2]It shall be lawful . . . to organize . . . for the purpose of . . . bettering the condition of the members of such organizations; or carry out the legitimate purpose *by any lawful means.* (Emphasis supplied.)

[3]Prosecution prohibited. No person shall be indicted, prosecuted, or tried in any court of this State for entering into or carrying on any lawful arrangement, agreement, or combination between themselves made with a view of lessening the number of hours of labor or increasing wages or bettering the conditions of working men and women, *or for any lawful act done in pursuance thereof.* (Emphasis supplied.)

have been decided, unless it appears that such a question was necessarily involved in the decision. See *Moore v. Mississippi,* 21 Wall. 636 (1875), and annotation in 84 L.Ed. 925 at 941. No federal question was necessarily involved in the decision below. To the extent that federal court precedents and First Amendment interests were discussed in the decision of the court below, this discussion was not necessary to the ruling. Therefore, the judgment of the Supreme Court of Washington, reversing the criminal trespass convictions under a state statute, rests on adequate and independent state grounds and as such is not reviewable by this Court. *Herb v. Pitcairn,* 324 U.S. 117 (1945). At the very least, it is clear that this is a case in which the questions of state law "are so interrelated" with any conceivable federal question "as not to warrant the exercise of the certiorari jurisdiction of this Court." *Duncan v. Tennessee,* 405 U.S. 86, 87 (1972).

II

THE DECISION BELOW IS CORRECT ON THE MERITS AND DOES NOT WARRANT REVIEW BY THIS COURT

If there is any federal issue before this Court, it is whether an uncontested Washington State trespass statute could be used to punish the Respondents' exercise of First Amendment rights of entry, at the invitation of the tenant-workers, to the migrant labor camp owned and used for business purposes by a private corporate employer. Petitioner contends that under the principles of *Central Hardware Co. v.*

NLRB, 407 U.S. 539 (1972) and *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972), the Respondents did not have a First Amendment right to enter into the migrant camp. The Petitioner's argument is palpably invalid.

In *Lloyd Corp. v. Tanner,* this Court limited the applicability of *Marsh v. Alabama,* 326 U.S. 501 (1946), and *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U.S. 308 (1968), but by no means did it overrule these decisions. In the *Lloyd* case the Court distinguished *Marsh* on the ground that it dealt with the special situation of a "company town." The Court also ruled that *Logan Valley Plaza* recognized only a limited First Amendment protection for picketing "directly related in its purpose to the use to which the shopping center property was being put" (*Lloyd Corp. v. Tanner,* 407 U.S. at 563), and under the facts of *Logan Valley Plaza,* there were no other reasonable means of communication available to the persons seeking to exercise their First Amendment interests (*Lloyd Corp. v. Tanner,* 407 U.S. at 566).

The facts of the instant case are in no way similar to those of *Lloyd Corp. v. Tanner;* they are very similar to the facts in both *Marsh* and *Logan Valley Plaza.* Thus, even under the tests as defined in *Lloyd Corp. v. Tanner,* the Respondents' actions were protected by the First Amendment.

The purpose of the Respondents' entry onto the migrant camp was to support and enhance union organization by rendering urgently needed legal counsel to

the worker-residents concerning their rights in their employment situation. (See Petition for Writ of Certiorari, App. 4-5.) In the instant case there is a direct relationship between the Respondents' exercise of their First Amendment rights and the business operations of the migrant camp by the employer. Hence, this case is like *Logan Valley Plaza* and unlike *Lloyd Corp.* See 407 U.S. at 563. Additionally, unlike *Lloyd Corp.*, where the picketers had a convenient and adequate alternative means of communication, obviously the Respondents had to enter the employer's premises, where the intended audience both worked and lived, to accomplish their First Amendment protected purposes. See *Logan Valley Plaza,* 391 U.S. at 321-22.[4] Thus it is clear that the facts of this case bring the decision under the principles of *Logan Valley Plaza* as clarified by *Lloyd Corp. v. Tanner.*

This case provides the Court with an example of what the Court in *Lloyd Corp.* referred to as an economic anomaly of the past, "the company town." 407 U.S. at 561. This anomaly continues to exist in its rural counterpart, "the migrant camp." Numerous courts have described the conditions of these camps. The District Court in *Forgueras v. Hassle,* 331 F.

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[4]Petitioner maintains that Respondent Fox had no right to offer his services to the migrant workers. That this argument is clearly wrong is shown by the cases cited by the lower court which demonstrate that Fox had a right under the First and Fourteenth Amendments to accept the workers' invitation to assist them. See *Brotherhood of R. R. Trainmen v. Virginia ex rel. Virginia State Bar,* 377 U.S. 1 (1964); *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963); *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n,* 389 U.S. 217 (1967); *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971).

Supp. 615, 620 (W.D. Mich. 1971) described some of the problems of isolation characteristic of migrant life.

> Language, color, and culture isolate the migrant from the community where he works. Migrants live in labor camps, often miles from the nearest town; usually they do without private transportation. This severely limits access to nearby towns. Long working hours and money likewise limit the ability to leave camp.

The Court in *Franceschina v. Morgan,* 346 F.Supp. 833, 835 (S.D. Ind. 1972), stated:

> Although theoretically free to travel about when not at work, most migrants spend their leisure time in camp. The language barrier, lack of transportation, lack of surplus funds for tourism, and the desire to try to save a little money for the winter all contribute to this result. They are reluctant to discuss matters with persons represented by plaintiffs in such places as public stores and shopping centers, assuming that they ever travel to such, because their Spanish language dialogues draw unwanted attention from the natives. As a practical matter, therefore, their best assurance of contact with the outside world is by means of visits to their camp. . . .

In this case, the migrant laborers paid Rogers Walla Walla, Inc. $1.75 per day for board and room, for which the company provided a diversity of services at the camp such as a mess hall, store, recreation room, laundry facility and a company office containing the camp's only telephone. (Petition for Certiorari, App. 3.) Thus, as in the company town de-

scribed in *Marsh v. Alabama,* the migrant labor camp in this instant case takes on the functions of a town, in which the workers spend much, if not all of their time. To such a place, *Marsh's* First Amendment standards apply.

Central Hardware Co. v. NLRB, 407 U.S. 539 (1972), which was relied upon by the Petitioner is totally inapplicable because that decision was based on the application of § 7 of the National Labor Relations Act, 29 U.S.C. § 157. Since agricultural workers are not entitled to the protections of the National Labor Relations Act, see 29 U.S.C. § 152(3), it would be perverse to subject them to any limitations of their constitutional rights that may emanate from the statute. But this Court need not address that question. For, if it were applicable, § 7 would protect the activities at issue in the instant case. The migrant camp is "like a mining or lumber camp where employees pass their rest as well as their work time on the employer's premises, so that union organization must proceed upon the employer's premises or be seriously handicapped." *Republic Aviation Corp. v. National Labor Relations Board,* 324 U.S. 793, 799 (1944). As this Court has ruled, ". . . when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." *National Labor Relations Board v. Babcock Wilcox Co.,* 351 U.S. 105, 112 (1956).

CONCLUSION

For the foregoing reasons, Respondents contend the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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December, 1973.